

1 Comment

VB verfassungsblog.de/brexit-scot-in-could-a-non-independent-scotland-stay-in-the-european-union-in-case-of-a-brexit/

So this is it. The Tories have won. That puts the United Kingdom on track for a Brexit (short for “British exit”) referendum. However, another important result of these elections is the impressive rise of the Scottish National Party, from 6 seats in 2010 to 56 (out of 59 seats for Scotland in the House of Commons) in 2015 – the highest performance of the SNP since its creation in 1934. The famous French newspaper *Le Monde* called this situation an “electoral secession”, which is quite a good way to describe the situation. This may have important consequences for British politics. David Cameron will clearly have a hard time imposing his policy to a region that rejected his party with such a clear majority. However, I would like here to focus on the European aspect of this result.

Scotland, would it seem, is quite attached to the European Union. Nicola Sturgeon, the leader of the SNP, already made it quite clear that Scotland would not agree to being dragged out of the European Union by the English. A Brexit referendum might therefore trigger another Scottish independence referendum. That prospect clearly puts David Cameron between a rock and a hard place. Is there a way around? A lot has been said and written about the Scottish independence referendum and the question of [whether an independent Scotland could stay in the European Union](#). A lot has also been said about the potential consequences of a Brexit. However, another question seems to have remained undiscussed. Would it be possible for a non-independent Scotland to stay in the European Union if the United Kingdom were to leave it?

This question may seem absurd. Only a State can be a member of the European Union. As long as Scotland is not an independent State, its fate is linked to that of the United Kingdom. Should the United Kingdom choose to leave the European Union using the procedure laid down under Article 50 of the Treaty on the functioning of the European Union, a non-independent Scotland would have no legal possibility to stay in it. However, there is a precedent of a *partial* withdrawal of a Member State from the European Union. In 1985, following a referendum of 1982, Greenland “withdrew” from the (then) European Communities, even though Denmark – which it is a part of – remained in the European Communities. The legal arrangement for that situation took the form of a treaty, known as “[The Greenland Treaty](#)”. Legally speaking, this treaty was an amendment to the existing treaties, in accordance with the amendment procedure – just like the Lisbon Treaty, and the Nice Treaty before that, and the Amsterdam Treaty before that. Can we then imagine that a treaty could amend the existing treaties so that the United Kingdom would remain a member of the European Union, just without England?

That is extremely unlikely from a political point of view and that would also be awfully complex from a legal point of view. It is one thing to withdraw from the European Union a remote and already very autonomous region – as was the case with Greenland. It is quite another to withdraw the region in which the *central government* is located! Since it is a basic principle of both constitutional law and international law that the central government is in charge of international relations, this seems nearly impossible. However, let us not forget that the European construction, in a lot of ways, has shifted from being an “ordinary” international organization to something else entirely. This “something” is very hard to define, but we can say for sure that the Member States are strongly integrated to it. Would that allow the European Union to bypass London and speak directly with Edinburgh?

As a matter of fact, there are already provisions in the treaties allowing “sub-State” entities to participate in certain institutions of the European Union. Article 16§2 of the Treaty on European Union reads as follows: “The Council shall consist of a representative of each Member State at ministerial level”. Not *central* level, *ministerial*. This ambiguity is intentional. This wording allows Federal States to be represented by ministers from sub-State governments. Of course, there would be a lot more to consider in order to put in place all the legal and institutional arrangements required for such a strange “Brexit/Scot-in” (British exit with Scotland staying in) situation. Who, for example, would represent Scotland at the European Council? Would it be the British Prime Minister with a mandate from the Scottish First Minister, or would it be, by way of derogation, the Scottish First

Minister? There is also the problem of citizenship. Under Article 9 of the Treaty on European Union, “Every national of a Member State shall be a citizen of the Union”. How could this apply to Scotland since there is no “Scottish nationality”? Let us just say that Law is basically like clay. As long as you use the right procedures to model it, and providing that there is enough political determination, there is virtually nothing you cannot achieve. It is all the more true for the amendments to the European treaties, since there is absolutely no limit to the content of such amendments, as long as the amendment procedure is followed. If necessary, a “Brexit/Scot-in” amendment could also be complemented by special arrangements, at national level, between the British Government and the Scottish Government.

We must also keep in mind that even in the event of a withdrawal, England probably would not wish to be completely isolated from the European Union, if only for business purposes. Therefore, it is likely that such an amendment treaty would have to profoundly amend the position of England in the European Union rather than just saying that the European treaties shall not apply to England. On the other hand, a simple amendment to the treaties may not be as satisfactory for the British Eurosceptics as an actual withdrawal. Moreover, let us not forget the obvious fact that such an amendment would require the consent of all the Member States, whereas Article 50 only requires the decision of the withdrawing State. However, this point only depends on the negotiating abilities of the United Kingdom. They could say for example, “my people have voted and we are leaving. Now either we use Article 50 and you lose us all, or we negotiate an amendment to the treaties and you can keep Scotland”. On the other hand, if the other Member States realise that the threat of a Scottish referendum might deter the United Kingdom from organising the Brexit referendum, or at least influence its result, they might refuse in advance any alternative for Scotland to stay in the European Union “without” England.

This is all a very long shot. Moreover, even if such a solution was practicable, it would not make it desirable. It would also raise a lot of other questions, not least of which would be the stance and status of Wales and Northern Ireland. However, there is no harm in making conjectures. After all, we may be on the verge of seeing something that seemed unthinkable ten years ago, a country leaving the European Union. In such times, the impossible becomes merely unlikely. As for the unlikely...

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